83-1522 (1)

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

REDDING FORD, a corporation,
Petitioner,

vs.

CALIFORNIA STATE BOARD OF EQUALIZATION,
an agency of the State of California,
GEORGE R. REILLY, ERNEST J. DRONENBURG, JR.,
WILLIAM M. BENNETT, RICHARD NEVINS and KENNETH CORY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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47 pp

QUESTIONS PRESENTED

1. Did 28 U.S.C. § 1341 bar the district court from subject matter jurisdiction of petitioner's action, challenging the Constitutionality of a deficiency assessment for sales or use taxes on leases of motor vehicles to United States Department of Agriculture, when (i) petitioner did not have sufficient assets to invoke the California statutory refund procedure for contesting the validity of such taxes and (ii) California law does not provide petitioner an alternative remedy either by declaratory or injunctive relief or by extraordinary writ? More specifically, is petitioner deemed to have a "plain, speedy and efficient" remedy within the meaning of § 1341 even though petitioner may not invoke the only remedy provided by California law because it does not have sufficient assets to prepay the tax deficiency of $239,466 (as of March 28, 1982) and sue for refund?

2. Did 28 U.S.C. § 1341 bar the district court from jurisdiction of petitioner's action to enforce the injunctive provisions of the decree entered in *United States v. California State Board of Equalization*, No. 79-03359-R(C.D. Cal. 1979), *aff'd in part, vac'd in part*, 650 F.2d 1127 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982) (table) (hereinafter *"California State Board of Equalization"*) permanently enjoining the California State Board of Equalization from collecting sales taxes on United States government lease transactions in California as of December 31, 1979?

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Table of Authorities Cited

Cases

Constitutions

Statutes and Rules

Other Authorities

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Redding Ford petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on December 16, 1983.

OPINIONS BELOW

The opinion of the court below is not yet published and is reprinted as Appendix A. The memorandum of decision of the district court is not officially published and is reprinted as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the district court was based on 28 U.S.C. §§ 1331 and 1343.

STATUTE INVOLVED

The statute involved is 28 U.S.C. § 1341 which provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner's complaint in the district court sought to obtain (i) a judicial declaration on the validity, under the Federal Constitution, of sales or use taxes assessed by the California State Board of Equalization and (ii) an injunction restraining respondents from collecting the deficiency assessment.

The complaint alleged that the deficiency assessment was an attempt to tax leases of tangible personal property to an instrumentality of the Federal Government (i.e., the United States Department of Agriculture); was in violation of the sovereign immunity of the United States from state taxation provided by the Constitution; and, in addition, was arbitrary, discriminatory and invalid under the Fourteenth Amendment to the Constitution. A copy of petitioner's complaint is reprinted as Appendix C.

Petitioner filed a motion for a preliminary injunction in the district court, pursuant to Rule 65(a) and (b) of

the Federal Rules of Civil Procedure, on the grounds that respondents' seizure of all of petitioner's assets would immediately and irreparably damage petitioner in that it would destroy petitioner's business and deprive petitioner of any assets with which to challenge the validity of the deficiency assessment in any forum.

Respondents filed a motion to dismiss the action, pursuant to Rule 12 of the Federal Rules of Civil Procedure, asserting that the district court lacked subject matter jurisdiction of the complaint under the provisions of 28 U.S.C. § 1341 in that the action sought an injunction against the collection of state taxes for which a "plain, speedy and efficient" state remedy existed.[1]

The district court (Hon. William A. Ingram) granted respondents' motion to dismiss, ruling that (i) California law provided a "plain, speedy and efficient" remedy under its tax refund procedure and consequently the action was barred by § 1341, and (ii) petitioner could not invoke the district court's jurisdiction to enforce the injunctive decree entered in *California State Board of Equalization* because to do so would improperly circumvent the prohibition of § 1341. (Appendix B)

Petitioner filed its notice of appeal to the court below on March 7, 1983.

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[1]Respondents moved to dismiss also on the ground that the action was barred by the Eleventh Amendment to the United States Constitution; the district court granted the motion as to the Board of Equalization but denied it as to the individual members of the Board and none of the parties appealed the court's ruling in this respect.

On appeal petitioner challenged both of the district court's rulings. It contended, as to the first ruling mentioned above, that petitioner had no remedy under California law within the meaning of § 1341—and certainly no "plain, speedy and efficient" remedy under that provision—since it could not invoke the California refund procedure and California provided no alternative remedy, under the reasoning of *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976) and decisions of other circuits. Petitioner argued that the decisions of this Court in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981) and *California v. Grace Brethren Church*, 457 U.S. 393 (1982), holding that state statutory refund procedures may constitute a "plain, speedy and efficient" remedy within the meaning of § 1341, did not apply because the taxpayers in both of those cases in fact could invoke the state refund procedures in question whereas here petitioner could not; furthermore, the reasoning of those decisions fully supported petitioner's contentions in that *Rosewell* clearly had stated, before § 1341 could be applied, states had to provide minimal procedures which taxpayers could invoke, and petitioner had none under California law.

As to the second district court ruling mentioned above, petitioner contended that the district court in *California State Board of Equalization* had already enjoined the Board of Equalization from collecting the very taxes here in question at the behest of the United States; that petitioner should have the right to enforce the injunction since it was procured for petitioner's benefit, as well as the benefit of the United States; and that § 1341 did not bar jurisdiction of the district court below because none of the policy considerations or reasons underlying the

enactment of § 1341 existed. That is to say, enforcement of the decree at this time caused no proscribed "intrusion" into state fiscal matters since such intrusion, if any, had already taken place when the action was brought by the United States and it had been sanctioned by all three levels of the federal judiciary.

The court below affirmed the judgment of dismissal, rejecting all of petitioner's contentions, basing its decision on the jurisdictional prohibition of § 1341. It held essentially:

> (i) On the first question presented here for decision, that an inability to prepay the deficiency assessment and invoke the California refund procedure was not a sufficient reason to avoid applying § 1341 (Appendix A 2-3); and
>
> (ii) As to the second question presented here, petitioner could not enforce the decree entered in *California State Board of Equalization* because, although that action was brought by the United States which was not bound by the jurisdictional limitation of § 1341, petitioner remained subject to the bar of § 1341 and had failed to join the United States as a party in the district court (Appendix A 3-5).

B. Facts

Petitioner has been engaged in the car dealership business since 1944 in and around Redding, California. As an adjunct to its business, it leased, for short periods of time, motor vehicles to the United States Department of Agriculture prior to selling them in the regular course of its business.

In the early part of 1981, the Board of Equalization ("Board") conducted an audit of petitioner's business for the purpose of auditing the payment of sales and use taxes and thereafter determined that for the period January 1, 1978 through December 31, 1980, petitioner owed sales or use taxes on the leased vehicles in the amount of $175,746.18 together with interest thereon in the amount of $54,774.58. In August 1981, petitioner petitioned the Board for redetermination of the deficiency assessment, asserting as grounds for redetermination essentially the same grounds asserted in its complaint in the district court. The Board rejected petitioner's contentions and issued its ruling redetermining the deficiency assessment at that time in the aggregate amount of $239,466. Thereafter the Board assessed a penalty of 10% of the assessment for failure to pay the tax. Interest has continued to accrue on the aggregate amount of the deficiency assessment, and the penalty, at a rate in excess of 10% per annum. Cal. Rev. & Tax Code § 6591. (Appendix C 9)

After issuing its Redetermination, the Board threatened to seize all of petitioner's assets, in partially collecting the tax, and petitioner filed its complaint in the district court and its motion for preliminary injunction. Petitioner alleged that the summary seizure of its assets would not only destroy its business but would effectively deprive it of the resources with which to challenge the validity of the tax assessment in any court. (Appendix C 12)

Petitioner did not have sufficient assets or resources with which to pay even substantially the amount of the deficiency assessment and filed its action in the district court because (i) petitioner could not comply with the requisites

of the California statutory refund procedure and thus invoke that procedure for challenging the assessment and (ii) California, by its constitutional, statutory and decisional law, prohibited alternative remedies whether or not destruction of a taxpayer's business was the consequence. (Appendix C 11)

It is appropriate to note that, to the extent the foregoing facts were "well pleaded," the courts below were required to assume they were true in ruling on the propriety of respondents' motion to dismiss. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 173-74 (1965); *Hillsborough T.P. v. Cromwell*, 326 U.S. 620, 625 (1946).

REASONS FOR GRANTING THE WRIT

A. First Question Presented: The Applicability of § 1341

The holding of the court below is in conflict with the explicit mandate of this Court in *Rosewell* that a state remedy must be provided to petitioner before § 1341 is held to bar petitioner's action in the district court. It also conflicts with the reasoning of other decisions of this Court as well as other circuit courts' construction of § 1341.

The Ninth Circuit based its holding essentially on an earlier decision of that court in *Wood v. Sargeant*, 694 F.2d 1159 (9th Cir. 1982):

> "In *Wood v. Sargeant* . . . we reviewed the 'plain, speedy and efficient' exception and held that a demonstrated inability to pay a tax does not avoid the jurisdictional bar of section 1341. * * * *Wood* did not improperly extend *California v. Grace Brethren Church* . . . or *Rosewell v. LaSalle National Bank* * * * We are bound by *Wood*." (Appendix A 3)

Wood contains the Ninth Circuit's reasoning on the question presented here. Plaintiffs in *Wood* did not have sufficient assets to prepay a tax assessment and therefore sought a declaratory judgment and injunctive relief in the district court. The district court granted defendant's motion to dismiss under the prohibition of § 1341 and the Ninth Circuit affirmed. The court relied principally upon *Rosewell.* It noted first that this Court had found the taxpayer in *Rosewell* had a plain, speedy and efficient remedy under the Illinois refund statute, although the statute did not provide for the payment of interest, and went on to conclude:

> "We think that the same can be said of a construction of § 1341 that would permit every state taxpayer who asserted or demonstrated an inability to pay the amount of the assessed tax to go into federal court to attack the tax. The potential of such a construction for obstructing the collection of state and local taxes, and for disrupting the orderly administration of the tax laws of the state, is great. We do not think that the Congress intended such a result. As the Court pointed out in *Rosewell,* the Congress knew when it adopted § 1341 in 1937 'that state tax systems commonly provided for payment of taxes under protest with subsequent refund as their exclusive remedy.' (p. 523, 101 S.Ct. at p. 1234) We cannot believe that Congress thought that the barrier to federal suits that it was erecting would have in it a door to the federal courts so wide as to admit *every impecunious or financially distressed taxpayer, or that the Supreme Court would open such a door.* (p. 1161; emphasis added.)

Petitioner respectfully disagrees with the Ninth Circuit's interpretation of the holding in *Rosewell* for several

reasons. First, *Rosewell* clearly is not authority for the proposition that a state refund procedure satisfies § 1341 even if a taxpayer cannot prepay the tax and invoke the procedure. An express premise of *Rosewell* was that the taxpayer in that action could *in fact* invoke the state procedure:

> "There is no doubt that the Illinois state court refund procedure provides the taxpayer with a 'full hearing and judicial determination' at which *she* may raise any and all constitutional objections to the tax." (450 U.S. at 514; emphasis added.)

Second, while the Court in *Rosewell* was divided five to four, it appears that all of the Justices concurred in the Court's categorical statement:

> "We explicitly state that a state remedy *must* 'provid[e] the taxpayer with a "full hearing and judicial determination" at which she may raise any and all constitutional objections to the tax.' " (450 U.S. at 515 n. 19; emphasis added.)

Here, petitioner may not invoke *any* California remedy. *Wood v. Sargeant, supra,* 694 F.2d at 1159 ("The [California] judicial remedy could be invoked only by first paying the tax. Cal. Const. Art. 13, § 32 . . . .").

Third, this Court in *Rosewell,* while applying a restrictive interpretation to § 1341, held:

> "Because the Illinois remedy imposes *no unusual hardship* on [the taxpayer] requiring ineffectual activity or an unnecessary expenditure of time or energy, we cannot say that it is not 'efficient.' " (450 U.S. at 518; emphasis added.)

The hardship on petitioner is evident: An inability to prevent the destruction of its business; the loss of resources with which to obtain an adjudication on the validity of the deficiency assessment under the Federal Constitution in any forum, state or federal. To avoid these consequences, petitioner must have the ability not only to invoke the state refund procedure but also the right to obtain a preliminary injunction to preserve its business during the course of adjudication. Petitioner can do neither under California law.

For these same reasons, the Ninth Circuit's reliance on *Grace Brethren* is misplaced. *Grace Brethren* essentially extended the reasoning of *Rosewell* to an action seeking declaratory relief and premised its holding on the *fact* that the taxpayer in that action could invoke the California refund procedure, noting that there ". . . is no dispute that [plaintiffs] in the present cases can seek a refund of the . . . tax through . . . [California] judicial procedures." 457 U.S. at 413.

In applying § 1341, the Ninth Circuit also erroneously relied, by way of analogy, upon decisions construing the *federal* anti-injunction statute (Internal Revenue Code § 7421(a)), including *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962). *Wood, supra,* 694 F.2d at 1161. But the federal anti-injunction statute is not analogous in any respect to § 1341, nor are the cases construing it. The federal statute does not contain any exception such as the "plain, speedy and efficient" exception found in § 1341. The materiality of this distinction—i.e., the distinction between the absolute prohibition contained in the federal anti-injunction statute and the limited prohibition of § 1341—

is discussed in *Enochs*. *Enochs* distinguished § 1341 from the federal anti-injunction provision, concluding that if Congress had intended an exception to the federal anti-injunction provision, it specifically would have said so as it had done in § 1341 by inclusion of the "plain, speedy and efficient" exception. 370 U.S. at 6.

The Ninth Circuit has mistakenly reasoned that if the destruction of a taxpayer's business does not prevent application of the federal anti-injunction statute, such facts should not prevent the application of § 1341. It has failed to draw the very distinction between the text of the two statutes articulated in *Enochs*. Is not the unavailability of a state remedy to prevent the destruction of a taxpayer's business an "unusual hardship"—a deprivation of minimal procedural safeguards—within the meaning of *Rosewell*, precluding the application of § 1341? *Rosewell, supra*, 450 U.S. at 512, 516-18; *Grace Brethren, supra*, 357 U.S. at 411-12. *See Nat. Carriers' Conference v. Heffernan*, 440 F.Supp. 1280, 1982-83 (D.C. Conn. 1977) (the district court declined to apply § 1341 in part because it found the Connecticut remedy inadequate based on doubt whether the State court would assume jurisdiction, the existence of a ten percent tax penalty, and the right of the State taxing body to seize summarily the taxpayer's assets without prior judicial determination possibly causing a "serious disruption of [plaintiff's] activities.")

In finding that the inability to invoke the refund procedure was not a sufficient reason for avoiding the bar of § 1341, the Ninth Circuit declined to evaluate properly the penalty aspect of the tax assessment, pleaded by petitioner, and its effect on petitioner's inability to prepay the assessment. The tax assessment constitutes a severe

penalty, as applied to petitioner, in that the assessment is measured by the total cost of the leased vehicles to petitioner rather than the amount of rental payments received by petitioner from the Department of Agriculture. Petitioner's cost bears no reasonable relationship to, and greatly exceeds, the lease proceeds petitioner in fact received. The average length of the leases to the Department of Agriculture was only six months. (Appendix C 9, ¶ 15) The effective rate of the tax assessment is twenty percent of the gross rentals received by petitioner under the leases, rather than the prescribed six percent rate for sales or use taxes under California law. (Appendix C 12, ¶ 11) This method of calculating the tax adopted by respondents, together with the ten percent penalty imposed because petitioner could not pay the tax assessment, added greatly to petitioner's inability to prepay the tax assessment and invoke the refund procedure. Requiring the taxpayer to prepay such penalties as a condition for invoking the only state remedy should constitute an "unusual hardship" within the meaning of *Rosewell;* it does not meet the "efficient" requirement of § 1341.

See *Denton v. City of Carrollton,* 235 F.2d 481, 485 (5th Cir. 1956) (declining to apply § 1341, finding that the payment of a large sum of money as a condition to testing the validity of a tax punitive in nature presented "such a heavy burden that to decline equitable relief would be to deny judicial review altogether"); *Garrett v. Bamford,* 538 F.2d 63, 70-72 (3rd Cir. 1976), *cert. denied,* 429 U.S. 977 (1976) (holding § 1341 did not apply because, *inter alia,* Pennsylvania remedies "would impose substantial expense on plaintiffs' efforts to prove their case").

The holding below causes serious confusion on the meaning and application of this Court's decision in *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976) and among circuit court decisions. In *Tully*, a case very similar on its facts to those at bench, the plaintiff sought to enjoin the collection of New York sales taxes. Defendants objected to the district court's jurisdiction, citing § 1341. A three-judge district court held that § 1341 did not bar federal jurisdiction when the New York refund procedure could not be invoked by a taxpayer because of insufficient funds and there were no other adequate alternative remedies available under New York law. This Court reversed, applying § 1341, but only after determining that New York law provided taxpayers the right to challenge the constitutionality of tax assessments, prior to the payment of the tax, by suits for declaratory relief. 429 U.S. at 74-75. The decision noted that the taxpayer could protect itself by preliminary injunction during the pendency of its suit. 429 U.S. at 75-76. While this Court did not deem it necessary to consider the adequacy of the New York refund procedure (presumably because the procedure could not be invoked by the taxpayer, see 429 U.S. at 76 n 8) the import of *Tully* is that when insufficient assets prevent a taxpayer from invoking a state refund procedure, § 1341 is not applicable unless state law provides an alternative remedy. So noted the First Circuit's decision in *Ludwin v. City of Cambridge*, 592 F.2d 606 (1st Cir. 1979). Citing *Tully*, the court stated:

> "Where a refund procedure is not available to a taxpayer due to *insufficient funds*, the *dispositive consideration* whether a federal court will entertain the suit is the availability of other avenues in the state court to present the taxpayer's federal claims and obtain relief." (p. 609; emphasis added.)

See also *28 East Jackson Enterprises, Inc. v. Cullerton,* 523 F.2d 439, 441-42 (7th Cir. 1975), *cert. denied,* 423 U.S. 1073, *reh. denied,* 424 U.S. 959 (1976), which the Ninth Circuit expressly declined to follow in *Wood.* 694 F.2d at 1161.

There is a conflict between the Ninth Circuit's reasoning in the holding below and its recent decision in *Capital Industries-Emi, Inc. v. Bennett,* 681 F.2d 1107 (9th Cir. 1982), *cert. denied,* 455 U.S. 943 (1982). In *Bennett,* the application of § 1341 was considered in two companion cases. In one of the cases, the Ninth Circuit reversed the trial court's dismissal under § 1341 on the ground that the taxpayer did not have an adequate judicial remedy within the meaning of § 1341. In commenting on § 1341, the court stated:

> "A state refund action, however, does not constitute an adequate remedy in all situations. 'Special circumstances' may render such an action 'of doubtful efficiency,' in which case jurisdiction in federal courts is *not* excluded. * * * The *inability of the taxpayer to pay a proposed assessment* may constitute such a 'special circumstance.' See *Denton v. City of Carrollton,* 235 F.2d 481, 485 (5th Cir. 1956) (assessment may pose such a heavy burden that to deny equitable relief is to deny judicial review)." (p. 1114 n 20; emphasis added.)

Cf. *Matthews v. Rodgers,* 284 U.S. 521, 528 (1932) (a pre-section 1341 decision in which this Court, after holding that the district court did not have equitable jurisdiction to entertain an action to invalidate a state tax because the state remedy for refund afforded an adequate legal remedy, nevertheless qualified its decision by adding: ". . . in the absence of allegations in the bill, which are wanting here, of special circumstances showing *inability of the taxpayer to pay the tax. . . .*" (emphasis added.))

The decision below did not give proper weight to two factors, pleaded by petitioner, in applying § 1341. One is the threatened loss of petitioner's good will and the other is the threatened loss of its franchise agreement with Ford Motor Company—two valuable intangible assets which petitioner cannot protect without an injunction *pendente lite.* California courts are prohibited by the California Constitution from granting such relief. California Constitution, Article XIII, § 32; California Revenue and Taxation Code, § 6931; see *California v. Grace Brethren Church, supra,* 457 U.S. at 400 n 10 (1982). The inability of petitioner to protect itself against the probability of such losses alone constitutes a sufficient basis to bar the application of § 1341. In *Georgia Railroad & Banking Co. v. Redwine,* 342 U.S. 299 (1952), this Court declined to apply § 1341, in a suit to enjoin a collection of state taxes, holding that the state refund remedy was not plain, speedy or efficient when it did not allow the taxpayer to recover all of the taxes paid —i.e., the taxpayer could not be compensated by the state remedy for all of its loss. 342 U.S. at 302-303.

This case presents the Court with the opportunity of resolving the foregoing conflicts and confusion in the interpretation of § 1341 and to set the limitations to be imposed in applying the section in two significant and important areas: inability and hardship in prepaying taxes necessary to invoke state refund procedures and the unavailability of preliminary injunctive relief in state courts when irreparable injury is threatened.

The defenselessness of petitioner's position under California law cannot be overstated. It is illustrated by *Modern Barber Col. v. Cal. Emp. Stab. Com.,* 31 Cal.2d 720 (1948)

in which the California Supreme Court held—even though a taxpayer did *not* have an adequate remedy—that California courts could not grant any remedy having the effect of restraining the collection of taxes:

> ". . . the [California] Constitution does not give the appellate courts the jurisdiction to issue an injunction, and . . . to issue an injunction in guise of some other writ . . . would constitute an unconstitutional interference with the jurisdiction granted to the trial courts, as well as an unconstitutional enlargement of the jurisdiction of the appellate courts." (p. 730)
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> • • •
>
> "The [taxpayer's] allegation that payment of the claims asserted against it will render it insolvent is one which could be made against any tax and can have no relevancy in a situation where this court, by express legislative provision, is prohibited from interfering in advance of payment of the tax. The argument that compliance with the statute may *cause hardship* in some instances *is one which can be addressed only to the legislature.*" (p. 732; emphasis added.)

The dissenting opinion in *Modern Barber* highlights the problem facing petitioner under California law:

> "The majority opinion holds that the respondent commission has the absolute right and the power to cause petitioner's assets to be summarily sold at public auction in order to collect from petitioner the illegal [tax]. . . ." (p. 733)

and

> ". . . [the majority opinion holds] that the courts of this state are without *power* to stay or in any way interfere with the collection of the illegally [assessed taxes] even though admittedly such collection will

> force petitioner into 'receivership and bankruptcy.' " (p. 734; emphasis added.)

Granted there is an announced Congressional policy against interference with states' tax collection processes, but does not the inclusion of the "plain, speedy and efficient" exception in § 1341 announce a dominant federal policy of providing an effective forum to *every* taxpayer, if not in state courts, then in the federal district court?

Contrary to the reasoning of the Ninth Circuit, impecunious taxpayers should be entitled to the same procedural due process as pecunious taxpayers in challenging state tax assessments under the Federal Constitution. In the Congressional Record, Senator Bone "emphasized" that § 1341 "does not take away any equitable right of a taxpayer or deprive him of a day in court" and that the provision was not intended to bar federal district courts of jurisdiction unless state law "assured" taxpayers the right to a full hearing and a judicial determination. 81 Cong. Rec., p. 1416 (1937); see also, S. Rep. No. 1035, 75th Cong., 1st Sess, 2 (1937); H.R. Rep. No. 1053, 75th Cong., 1st Sess, 2 (1937).

Particularly applicable here are this Court's most recent remarks in *Grace Brethren*:

> "This Court has not *hesitated* to declare a state refund provision *inadequate* to bar federal relief if the taxpayer's opportunity to raise his constitutional claims in the state proceedings is *uncertain.*" (457 U.S. at 414 n 31; emphasis added.)

Petitioner's remedies under California law at best are uncertain.

B. Second Question Presented: The Enforceability of the Judgment in California State Board of Equalization

The question of whether the district court below had jurisdiction to enforce the decree entered in *California State Board of Equalization* presents an important question of federal law which has not been, but should be, settled by this Court. Does a district court not have jurisdiction to enforce an injunction entered in the same judicial district because of the prohibition provided in § 1341?

The judgment of the district court, entered in December 1979, provides:

> "It is hereby further ORDERED, ADJUDGED AND DECREED that the defendant [California State Board of Equalization] is permanently enjoined from collecting the sales or use tax on United States government lease transactions in California as of December 31, 1979." (Appendix C 20)[2]

The facts pleaded in plaintiff's complaint bring the Board's deficiency assessment squarely within the prohibition of this injunction. Leases of passenger vehicles constitute "sales" within the meaning of the California Sales and Use Tax Laws. California Revenue and Taxation Code, § 6006(g) (" 'Sale' means and includes: . . . Any lease of tangible personal property in any manner or by any means whatsoever. . . .").

The Ninth Circuit found that the district court below had neither independent nor ancillary jurisdiction to en-

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[2]Petitioner has been informed that, by stipulation of the parties after affirmance of the judgment by the Ninth Circuit, the words "or use" were deleted; the deletion, however, does not affect petitioner's contention in support of this petition.

force the judgment. (Appendix A 3-4) On the question of independent jurisdiction, the court reasoned that assuming there was an "identity of interest" between petitioner and the United States, petitioner nevertheless could not enforce the judgment because joinder of the United States as a party was necessary before a "federal instrumentality" could overcome § 1341. (Appendix A 4-5)

Assuming, *arguendo,* that the United States should have been made a party, the court still should not have affirmed the judgment of dismissal for lack of jurisdiction under § 1341. The district court's judgment was entered "with prejudice." (Appendix B 7) The effect of the court's affirmance is to deny permanently petitioner's right to invoke federal jurisdiction on its claim. Petitioner should have been given an opportunity to join the United States. This question was never raised, nor argued, in the district court nor in the court of appeals by any party.

Petitioner does not claim to be an "instrumentality" of the federal government. It is a third-party beneficiary of the judgment in question in effect. The interests of the United States and petitioner are identical: to thwart the attempt by the Board to collect sales taxes on leases of tangible personal property to federal government instrumentalities. Petitioner's right to enforce the judgment in *California State Board of Equalization* is derived through the United States. Under California law, the tax is imposed upon the lessee but is collected through the lessor; it operates directly and immediately upon petitioner as the lessor. Permitting petitioner to enforce the injunction in the first instance is an effective and practical means of furthering the federal policy of prohibiting state taxation upon federal

government instrumentalities. See *Diamond National Corp. v. State Board of Equalization,* 425 U.S. 268 (1976); *United States v. State Board of Equalization,* 536 F.2d 294 (9th Cir. 1976).

As the lessor, petitioner has a continuing and vested interest in preventing the state from collecting unconstitutionally imposed taxes, which interest remains long after it has committed itself not to charge sales or use taxes in leases and long after petitioner's leases have been performed and have terminated. At that point, is the United States' interest sufficient to require its joinder (as distinguished from a non-jurisdictional requirement of having to notify the United States of the filing of the action so that it can intercede if it desires to do so)? The sheer number of leases entered into each year suggests that a jurisdictional joinder requirement is both impractical and excessive.

Petitioner submits the court's holding that § 1341 barred the district court's subject matter jurisdiction—at least without having had an opportunity to join the United States—constituted an improper extension of the jurisdictional limitation of § 1341.

CONCLUSION

For the reasons set forth above, petitioner respectfully asks the Court to grant this petition for certiorari.

March 5, 1984.

Respectfully submitted,

WILLIAM L. SCOTT
Counsel for Petitioner

(Appendices follow)

Appendix A

In the United States Court of Appeals
For the Ninth Circuit

No. 83-1799

Dist. Ct. No. C-82-352-WAI

Redding Ford, a corporation,
Plaintiff-Appellant,

vs.

California State Board of Equalization,
an agency of the State of California,
George R. Reilly, Ernest J. Dronnenburg, Jr.,
William M. Bennett, Richard Nevis, and Kenneth Cory,
Defendants-Appellees.

OPINION

[Filed Dec. 16, 1983]

On appeal from the United States District Court
for the Northern District of California
William A. Ingram, District Judge, Presiding

Argued and submitted November 18, 1983

Before: DUNIWAY, TIMBERS,* and SKOPIL, Circuit Judges

SKOPIL, Circuit Judge:

Redding Ford appeals the dismissal of its action for declaratory and injunctive relief from the collection of

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*The Honorable William H. Timbers, United States Circuit Judge for the Second Circuit, sitting by designation.

state taxes. The district court dismissed for lack of subject matter jurisdiction. On appeal, Redding Ford argues that (1) the Tax-Injunction Act, 28 U.S.C. § 1341, did not bar jurisdiction or (2) the federal court had ancillary jurisdiction to hear the case. We affirm.

Facts and Proceedings Below

As part of its business, Redding Ford leased new motor vehicles to the federal government. Appellees, members of the state Board of Equalization, determined that Redding Ford owed sales and use taxes on the lease agreements. Redding Ford unsuccessfully argued to the Board that the assessment constituted a tax on an instrumentality of the United States and accordingly violated the constitutional intergovernmental immunity against such taxation.

Redding Ford did not pursue additional remedies under state law which provide for payment of the disputed taxes followed by a claim for refund, Cal. Rev. & T. C. §§ 6901-6908, or a suit for refund in state court, Cal. Rev. & T. C. §§ 6931-6937. Instead, Redding Ford filed suit in federal district court alleging that it did not have sufficient assets to prepay the tax assessment and seek a refund.

Discussion

A. Standard of Review

A dismissal based on lack of subject matter jurisdiction is freely reviewable on appeal. *Societe de Conditionnement v. Hunter Engineering,* 655 F.2d 938, 941-42 (9th Cir. 1981).

B. Tax Injunction Act

The Tax Injunction Act, 28 U.S.C. § 1341, provides that district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law

where a plain, speedy and efficient remedy may be had in the courts of such State." Redding Ford argues that it has no "plain, speedy and efficient" remedy under state law and therefore federal jurisdiction is not precluded. Specifically, it claims that California's prepay refund requirement, Cal. Constitution, Art. XIII, § 32 and Cal. Rev. & T. C. §§ 6901-08; 6931-37, prevents state relief since Redding Ford does not have sufficient assets to pay the assessments.

In *Wood v. Sargeant,* 694 F.2d 1159, 1160 (9th Cir. 1982), we reviewed the "plain, speedy and efficient" exception and held that a demonstrated inability to pay a tax does not avoid the jurisdictional bar of section 1341. The dictum in *Capitol Industries-EMI, Inc. v. Bennett,* 681 F.2d 1107, 1114 n.20 (9th Cir.), *cert. denied,* 455 U.S. 943 (1982) does not compel a different result. Furthermore, *Wood* did not improperly extend *California v. Grace Brethren Church,* 457 U.S. 393 (1982) or *Rosewell v. LaSalle National Bank,* 450 U.S. 503 (1981). In both cases, the Court recognized that Congress intended to prevent federal court interference with the assessment and collection of state taxes. *Grace Brethren,* 457 U.S. at 411; *Rosewell,* 450 U.S. at 522-23. The Court refused to read expansively what Congress intended to be a narrow exception. *Rosewell,* 450 U.S. at 524. We applied this same reasoning in *Wood,* 694 F.2d at 1160-61. We are bound by *Wood. See LeVick v. Skaggs Companies, Inc.,* 701 F.2d 777, 778 (9th Cir. 1983) (unless there is intervening Supreme Court authority or *en banc* review, the holding of a prior panel is controlling authority).

C. Ancillary Jurisdiction

Redding Ford argues that the lower court had jurisdiction independent of section 1341. It contends such jurisdic-

tion is ancillary and is derived from the lower court's prior judgment in *United States v. California State Board of Equalization,* No. 79-03359-R (C.D. Cal. 1979), *aff'd in part, vac'd in part,* 650 F.2d 1127 (9th Cir. 1981), *aff'd,* 456 U.S. 901 (1982) (table). We find no basis for ancillary jurisdiction. Such jurisdiction typically involves claims by a defending party brought into court against its will, or by another person whose rights might be irretrievably lost unless she could insert them in an ongoing federal action. *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 376 (1978). Ancillary jurisdiction cannot be extended beyond the claims asserted in one action. *E.g., Fidelity & Cas Co. v. Reserve Insurance Co.,* 596 F.2d 914, 918 (9th Cir. 1979).

Redding Ford argues that the district court had the authority to enforce its prior decree enjoining the collection of a tax against the United States. That action was brought by the United States which, unlike Redding Ford, is not bound by the jurisdictional limitation of section 1341. *Department of Employment v. United States,* 385 U.S. 355, 358 (1966). Redding Ford argues that there is an "identity of interest" between it and the United States sufficient to allow Redding Ford to assert the federal interest in federal court. We rejected that argument in *Housing Authority v. Washington,* 629 F.2d 1307, 1310-11 (9th Cir. 1980). There, a local housing authority, whose funding and general policy were provided by the United States, sought to enjoin the collection of taxes and to obtain a refund of taxes paid. The taxes had been previously declared unconstitutional by the same district court. *United States v. State of Washington,* No. C77-355V (W.D. Wash. 1977), *aff'd,* 654 F.2d 570 (9th Cir. 1981), *rev'd,* ..... U.S. ....., 103 S.Ct. 1344 (1983). The

lower court found the housing authority to be a federal instrumentality. The court ordered affirmative relief. We reversed, holding that joinder of the United States was necessary before a federal instrumentality could overcome section 1341. *Housing Authority,* 629 F.2d at 1311. We based our holding on "the strong policy of noninterference with state taxation procedures codified by § 1341, and upon the rationale . . . that the basis of the federal instrumentality doctrine is the presence of the United States as a party." *Id.*

Finally, Redding Ford relies on *Dickey v. Turner,* 49 F.2d 998 (6th Cir. 1931). *Dickey* involved an alleged fraud on the courts and a second action that included the same parties. Redding Ford's action is by a different plaintiff and involves a different tax than was litigated in the prior action. Furthermore, unlike *Dickey,* we are faced with a statute that specifically prohibits federal jurisdiction. *See Kelly v. Springett,* 527 F.2d 1090, 1094 (9th Cir. 1975) (suits brought under an independent jurisdictional statute such as 42 U.S.C. § 1983 are still subject to the proscription of section 1341).

CONCLUSION

The Tax Injunction Act, 28 U.S.C. § 1341, bars jurisdiction since Redding Ford has a "plain, speedy and efficient" state remedy. No other basis for jurisdiction exists.

The decision of the district court is AFFIRMED.

Appendix B

In the United States District Court
for the Northern District of California

No. C-82-3520-WAI

Redding Ford, a corporation,
Plaintiff,

v.

California State Board of Equalization, an agency of the State of California, George R. Reilly, Ernest J. Dronenburg, Jr., William M. Bennett, Richard Nevins and Kenneth Cory,
Defendants.

[Filed Feb. 24, 1983]

Memorandum of Decision

This action is DISMISSED for want of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1).

The remedy provided by California law as set forth in Revenue and Taxation Code §§ 6901 *et. seq.*, is plain, speedy and efficient within the meaning of the tax anti-injunction statute, 28 U.S.C. § 1341, and this Court therefore lacks jurisdiction of this cause. *Rosewell v. LaSalle National Bank,* 450 U.S. 503 (1981); *California v. Grace Brethren Church,* U.S. , 73 L.Ed.2d 93 (1982); *Wood v. Sargeant,* 694 F.2d 1159 (9th Cir. 1982).

The action is barred as to the defendant California State Board of Equalization by the provisions of the Eleventh Amendment, *Alabama v. Pugh,* 438 U.S. 781 (1978); *V.O.*

Motors, Inc. v. California State Board of Equalization, 691 F.2d 871 (9th Cir. 1982), but not as to the individually named defendants, to whom the protection of the Eleventh Amendment does not extend, at least where the relief sought is prospective only. *Ex Parte Young* 209 U.S. 123 (1908); *Edelman v. Jordan,* 415 U.S. 651 (1974); *Georgia Railroad and Banking Co. v. Redwine,* 342 U.S. 299 (1952).

The Eleventh Amendment was not congressionally abrogated by the enactment of 28 U.S.C. § 1341. *V.O. Motors, Inc., supra.*

Plaintiff's invocation of the ancillary jurisdiction of this Court based upon the judgment rendered in *United States v. California State Board of Equalization,* (CDCA No. 79-03359-R), is rejected by this Court. To hold otherwise would be to improperly circumvent the effect of § 1341.

The action is DISMISSED with prejudice.

DATED: 2 24 83

/s/ William A. Ingram
United States District Judge

Appendix C

WILLIAM SCOTT, ESQ.
2470 El Camino Real
Palo Alto, CA 94306
(415) 857-1100
Attorney for Plaintiff

United States District Court
Northern District of California

No. C-82-352-WAI

Redding Ford, a corporation,
Plaintiff,

v.

California State Board of Equalization, an agency of the State of California, George R. Reilly, Ernest J. Dronenburg, Jr., William M. Bennett, Richard Nevins and Kenneth Cory,
Defendants.

Complaint for Declaratory and Injunctive Relief Re Validity and Collection of Sales and Use Taxes

Plaintiff complains and alleges:

1. Jurisdiction of the Court is invoked under 28 U.S.C. §§ 1331 and 1343, and this Court's pendant and ancillary jurisdiction. The matter in controversy exceeds $10,000, exclusive of interest and costs, and arises under the Constitution and laws of the United States, especially, the constitutional intergovernmental immunity of the United States against state taxation and the due process and equal

protection clauses of the Fourteenth Amendment to the United States Constitution.

2. Plaintiff is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the state of California.

3. Defendant State Board of Equalization (hereinafter "Board") is an agency of the state of California authorized and responsible for the assessment and collection of the California sales and use taxes including parts 1, 1.5 and 1.6 of Division 2 of the California Revenue and Taxation Code and the rules and regulations promulgated thereunder (hereinafter collectively "Tax Code").

4. Defendants Reilly, Dronenburg, Bennett, Nevins and Cory are, and at all times herein mentioned were, the duly appointed members of the Board.

5. At all times herein mentioned since approximately 1944, plaintiff was a Ford Motor Company automobile dealer engaged in the business of purchasing from the manufacturer and selling motor vehicles in the State of California and, as an adjunct thereto since prior to 1978, was engaged in the business of leasing new motor vehicles to the Department of Agriculture of the United States for short periods of time (averaging six months or less), prior to the resale of the vehicles.

6. Over the years of the conduct of its business, plaintiff has acquired substantial goodwill constituting a valuable intangible asset of its business. Plaintiff conducts its dealership business pursuant to a Ford Motor Company franchise agreement which provides, inter alia, that in the event substantially all of plaintiff's assets are lost or seized, or

plaintiff becomes insolvent, Ford Motor Company may unilaterally terminate said franchise agreement. In the event said franchise agreement is terminated, plaintiff is informed and believes and upon such information and belief alleges that substantially all of the value of its goodwill will be destroyed and it thereafter will have no, or only nominal, value.

7. During the period January 1, 1978 through December 31, 1980, plaintiff leased certain passenger vehicles to the Department of Agriculture of the United States. Said leased vehicles at all times were purchased and held by plaintiff in the regular course of plaintiff's business primarily for resale and were resold by plaintiff in the regular course of its business after their respective leases terminated. Said leases constituted sales of tangible personal property within the meaning of § 6006(g) of the Tax Code.

8. Plaintiff paid no sales or use taxes to the Board when said vehicles were leased since plaintiff believed in good faith that said leases were not subject to sales or use tax imposed by the state of California because the leases were entered into with an instrumentality of the United States and were exempt from said taxes under the intergovernmental, constitutional immunity of the United States. Plaintiff based its belief on the decision of the United States District Court (for the central district of California) in *United States v. State Board of Equalization* (unreported) Civil Action No. 72-2568-R, affirmed, 536 F. 2d 294 (9th Cir. 1976). Had plaintiff believed sales or use taxes would be assessed on said leases by the Board, it would have elected the fair rental value of said leases as the tax measure; the fair rental value of each of said leases

amounted to only a small fraction of the purchase price of the vehicle leased.

9. In the early part of 1981, the Board conducted an audit of plaintiff's business for the purpose of auditing the payment of sales and use taxes and thereafter determined that for the period January 1, 1978 through December 31, 1980, plaintiff owed sales and/or use taxes (including local taxes) in the amount of $175,746.18 together with interest thereon in the amount of $54,774.58, with respect to said leases. On or about August 7, 1981, plaintiff petitioned the Board for redetermination of a portion of said assessment in the amount of $169,135.74 asserting as grounds for redetermination, inter alia, that the assessment constituted a tax on a instrumentality of the United States and violated the United States Constitution and, in addition, was arbitrary, and discriminatory and invalid under the Fourteenth Amendment to the United States Constitution. Thereafter, the Board issued its ruling redetermining said deficiency assessment in the amount of $169,135.74 in taxes, together with interest thereon in the amount of $70,330.46, totalling $239,466.20 as of May 28, 1982. A copy of the *Board's* Notice of Redetermination is attached hereto, marked exhibit "A" and made a part hereof.

10. Plaintiff does not have sufficient assets with which to pay all or substantially all of said tax assessment. Plaintiff is not able to pay said taxes and seek refund as provided and required by the California Constitution, Article XIII, § 32, and §§ 6901 *et seq.* of the tax code. Plaintiff has exhausted its administrative remedies for contesting the validity of said tax determination and does not have a plain, speedy and efficient state court remedy.

11. Said taxes constitute a penalty, and are invidiously discriminatory, in that they exceed (without adding interest or penalties) 20% of the gross rentals received by petitioner under the leases upon which the taxes are asserted to be due.

12. Defendants have demanded payment of said taxes forthwith and threatened to levy and collect said tax assessment through the Board's summary processes and to assess a penalty in the amount of $16,913.57 if said tax assessment is not paid by June 27, 1982. Plaintiff will be irreparably injured by defendants attempt to collect said taxes in that it will cause (i) a forced liquidation of plaintiff's assets, (ii) the insolvency and destruction of plaintiff's business, (iii) upon information and belief, the termination of its said franchise agreement with the Ford Motor Company and the loss of plaintiff's goodwill and (iv) plaintiff to be unable to maintain any action to contest the validity of said tax assessment.

Second Claim

13. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 12 hereof.

14. On or about September 6, 1974, the District Court in *United States v. State Board of Equalization,* entered its Judgment in Civil Action No. 72-2568-R, unreported, and entered its Amended Judgment *nunc pro tunc* on October 21, 1975, adjudging in part:

> "With respect to leases to the United States, for purposes of Federal Constitutional immunity, the legal incidence of the sales tax imposed by Parts 1, 1.5, and 1.6 of Division 2 of the California Revenue and Taxa-

> tion Code and the rulings and regulations issued thereunder falls and always has fallen on the United States as lessee whether United States is contractually obligated to reimburse its lessors for the tax or not and, therefore, the sales tax, insofar as it is imposed with respect to leases to the United States is illegal and void because it infringes the United States' immunity, under the Federal Constitution from state taxation." (¶ 2)

and:

> "The sales tax provided for by Parts 1, 1.5, and 1.6 of Division 2 of the California Revenue and Taxation Code and the rulings and regulations issued thereunder is and was imposed with respect to leases of tangible personal property to the United States but is not and was not imposed with respect to other leases, including leases to the State of California, and therefore with respect to leases to United States, the sales tax is and was invidiously discriminatory against United States and its lessors in violation of the Federal Constitution." (¶ 3)

Said Judgment was affirmed by the Court of Appeals, for the Ninth Circuit on May 7, 1976 (536 F. 2d 294) and is final.

15. On or about December 20, 1979, Judgment was entered in *United States of America v. California State Board of Equalization,* Civil Action No. 79-03359-R, decreeing in part that:

> "It is hereby further ORDERED, ADJUDGED and DECREED that the defendant [California State Board of Equalization] is permanently enjoined from collecting the sales or use tax on United States Government lease transactions in California as of December 31, 1979." (Paragraph 6, p.4)

A copy of said Judgment is attached hereto, marked Exhibit "B" and made a part hereof. Plaintiff alleges upon information belief that the parties to said action by stipulation deleted the word "or use" from said judgment. Said judgment was affirmed by the United States Supreme Court and is final (50 LW 3779).

16. A legal controversy exists by and between the parties hereto concerning their respective rights and obligations under and pursuant to the provisions of said injunction (Exhibit "B" hereto), and concerning the validity and collectibility of said tax assessment, in that:

a. Plaintiff claims and contends that (i) the imposition of sales or use taxes as redetermined by the Board (Exhibit A hereto) would violate the intergovernmental immunity from state taxation of the United States Constitution, (ii) the Board is collaterally estopped, and is barred by the doctrine of res judicata, from relitigating the determination that the legal incidence of California sales and use taxes with respect to leases of tangible personal property falls upon the lessee and, as sought to be imposed herein, said taxes are discriminatory and violate the United States Constitution, (iii) said tax assessment is invalid and contrary to the provisions of the Tax Code, (iv) defendant is and has been since December 31, 1979 enjoined and restrained from collecting from plaintiff said taxes by the prohibitory injunctive decree alleged in paragraph 15 hereof; (v) in the alternative plaintiff's remedy as provided and circumscribed by the Tax Code §§ 6901, *et seq.*, especially §§ 6903, 6931, 6932 and 6933, and Tax Code §§ 6738, 6757 and 6776 *et seq.*, especially 6796, and Article XIII, § 32, of the California Constitution, for contesting

the validity and collectibility of said taxes, is wholly inadequate and violates the substantive and procedural due process clauses of the Fourteenth Amendment to the United States Constitution; and (vi) in the alternative, the proper measure of the taxes sought to be imposed is the fair rental value of said leases rather than the purchase price of said leased vehicles; and

b. Plaintiff alleges upon information and belief defendants contend in all respects to the contrary.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follow:

a. for a declaration of the respective rights and obligations of the parties in the premises;

b. defendants be enjoined from assessing, levying and collecting said taxes; and

c. such other relief as the Court deems proper.

Dated: July 7, 1982.

/s/ William Scott
William Scott
attorney for Plaintiff

Exhibit A

State Board of Equalization
Department of Business Taxes
P.O. Box 1799 Sacramento, California 95808
Santa Rosa Office (707) 576-2100

Redding Ford
P. O. Drawer 2395
Redding, CA 96001 Date: May 28, 1982

Account Number
SR JH 98-032349

Notice of Redetermination

You are hereby notified that the action indicated below was taken on your petition for Redetermination of Sales and Use Tax.

	Amount			
	Tax	Interest	Penalty	Total
As Determined 1-1-78 to 12-31-80	$175,746.18	$54,774.58		$230,520.76
Adjustment		15,555.88		15,555.88
As Redetermined	175,746.18	70,330.46		246,076.64
Less Payment 8-6-81	—6,610.44			—6,610.44
Balance Due	$169,135.74	$70,330.46		$239,466.20

Interest has been calculated through 6-4-82; increase your payment by 83.41 for each day that payment is made after 6-4-82 to the date of payment.

Additional penalty of 16,913.57 if not paid by 6-27-82.

The Board concluded that petitioner was the consumer of mobile transportation equipment leased to the United States. The Board ordered that the tax be redetermined without adjustment.

cc: William Scott, Attorney at Law
2470 El Camino Real, Suite 108
Palo Alto, CA 94306

Exhibit B

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Attorneys for the United States of America

In the United States District Court for the
Central District of California

No. CV 79-03359-R

United States of America,
Plaintiff
vs.
California State Board of Equalization,
Defendants

[Filed Dec. 10, 1979]

JUDGMENT

This action having come on for hearing before the Court upon the motion of the plaintiff for partial summary judgment and the motions of the defendant, Honorable Manuel

L. Real, District Judge, presiding, and the issues having been duly heard and findings of fact and conclusions of law having been made, and good cause having been shown therefore,

It is hereby Ordered, Adjudged and Decreed that:

1. With respect to leases to the United States, for purposes of federal constitutional immunity, the determination of where the legal incidence of a tax falls is a federal question.

2. With respect to leases to the United States, for purposes of federal constitutional immunity, the legal incidence of the sales tax imposed by Parts 1, 1.5, and 1.6 of Division 2 of the California Revenue and Taxation Code ("Tax Code") and Section 1656.1 of the California Civil Code ("Civil Code") and the rulings and regulations issued thereunder falls and always has fallen on the United States as lessee whether the United States is contractually obligated to reimburse its lessors for the tax or not and, therefore, the sales tax, insofar as it is imposed with respect to leases to the United States is illegal and void because it infringes the United States' immunity, under the Federal Constitution, from state taxation.

3. The sales tax provided for by the Tax Code and Civil Code and the rulings and regulations issued thereunder is and was imposed with respect to leases of tangible personal property to the United States but is not and was not imposed with respect to other leases, including leases to the State of California, and therefore with respect to leases to the United States, the sales tax is and was invidiously discriminatory against the United States and its lessors in violation of the Federal Constitution.

4. Leases of tangible personal property made pursuant to General Services Administration (GSA) supply schedule contracts by contractors having cost-reimburseable contracts with the United States and having been authorized by the United States to use GSA schedule contracts were leases made by the contractor as agent of the United States for procurement purposes and, as such, were leases to the United States and were not subject to the California sales tax.

5. The California use tax is imposed without regard to whether the lessee is the user of the leased tangible personal property or not and, therefore, the imposition of the California use tax with respect to the use by non-lessee third-party contractors having cost-reimburseable contracts with the United States of tangible personal property leased pursuant to General Services Administration (GSA) schedule contracts on behalf of the United States by such contractors having been authorized by the United States to use GSA supply schedule contract is illegal and void because such imposition discriminates against the United States and its contractors in violation of the Federal Constitution .

6. The precise issue of unconstitutional discrimination presented in this action was decided in favor of the United States by this Court in the case of *United States v. State Board of Equalization,* Civil No. 72-2568-R C.D. Calif., Judgment entered September 6, 1974, unreported, Amended Judgment Nunc Pro Tunc entered October 21, 1975, unreported, affirmed in part, 536 F. 2d 294 (C.A. 9, 1976). That Judgment is now final and the issues finally decided by that Judgment were (1) that for purposes of federal immunity the legal incidence of the California sales tax falls upon the United States as lessee in violation of the constitutional

immunity of the United States from state taxation and (2) the imposition of sales tax with respect to leases to the United States—rather than the use tax, which is imposed with respect to other leases in California—unconstitutionally discriminates against the United States and its lessors. Although the Ninth Circuit in its decision at 536 F. 2d 294 only affirmed on legal incidence, both issues of legal incidence and discrimination were fully briefed and presented to the Court, and thus, the defendant is collaterally estopped from relitigating issues of unconstitutional discrimination already resolved by this Federal District Court in Civil Action No. 72-2568-R.

It is hereby further ORDERED, ADJUDGED and DECREED that the defendant is permanently enjoined from collecting the sales or use tax on United States Government lease transactions in California as of December 31, 1979.

It is hereby further ORDERED, ADJUDGED and DECREED that the defendant shall refund to the plaintiff all taxes (State and local) collected with respect to United States Government leases under the Tax Act and paid by the United States to its lessors and agent contractors and remitted to the defendant from January 1, 1979 to the date collection ceases.

It is hereby further ORDERED, ADJUDGED and DECREED that the defendant will pay the plaintiff pre-Judgment interest at the rate of 12% (unless Federal law provides for a greater interest rate at the time of payment) on all amounts due and owing to the plaintiff from the date the defendant collected the illegal taxes to the date this Judgment is entered and post-Judgment interest from the date this Judgment is entered to the date the defendant pays the plaintiff.

It is hereby further ORDERED, ADJUDGED and DECREED that the issue of the amount of refund due and owing by the defendant to the plaintiff is hereby severed for separate trial proceedings to be conducted by this Court 180 days after the defendant ceases collection of the sales tax with respect to United States Government leases.

Dated at Los Angeles, California, this 10th day of December, 1979.

/s/ Real
United States District Judge

Presented by:
Andrea Sheridan Ordin
United States Attorney
Charles H. Magnuson
Assistant United States Attorney
Chief, Tax Division
Arthur M. Greenwald
Assistant United States Attorney

By: /s/ Arthur M. Greenwald

Of Counsel:
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Washington, D.C. 20530
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By: /s/ John J. McCarthy

No. 83-1522 (7) COPY

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

REDDING FORD, a corporation,

Petitioner,

vs.

CALIFORNIA STATE BOARD OF EQUALIZATION, an agency of the State of California, GEORGE R. REILLY, ERNEST J. DRONENBERG, JR.,

WILLIAM M. BENNETT, RICHARD NEVINS and KENNETH CORY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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29 pp

QUESTIONS PRESENTED

1. Did the Ninth Circuit correctly affirm the dismissal for lack of subject matter jurisdiction of petitioner's complaint challenging the constitutionality of the assessment of use taxes on leases of motor vehicles, on the ground that the complaint was barred by 28 U.S.C. § 1341, where petitioner alleged in its complaint that it did not have sufficient funds to invoke the California procedure of prepaying the tax and filing a suit for refund?

2. Did the Ninth Circuit correctly affirm the District Court's decision that it was barred by 28 U.S.C. § 1341 from invoking ancilliary jurisdiction based upon the judgment rendered in United States v. California State Board of Equalization, No. 79-03359-R (C.D. Cal. 1979), aff'd 456 U.S. 901 (1982), cert. den. 456 U.S. 985 (1982), reh. den. 456 U.S. 985 (1982)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES PAGE

No. 83-1522

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

REDDING FORD, a corporation,

Petitioner,

vs.

CALIFORNIA STATE BOARD OF EQUALIZATION, an agency of the State of California, GEORGE R. REILLY, ERNEST J. DRONENBERG, JR.,

WILLIAM M. BENNETT, RICHARD NEVINS and KENNETH CORY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

The Tax Injunction Act, 28 U.S.C. § 1341 (hereinafter "§ 1341") prohibits district courts from enjoining the collection of any state

taxes when a "plain, speedy and efficient" remedy may be had in the state courts.

Petitioner argues that it has no "plain, speedy and efficient" remedy under state law because it does not have sufficient assets to take advantage of California's refund procedure which provides for payment of the taxes and administrative proceedings before the taxes' legality can be tested in court in a refund action.

Petitioner filed a complaint in the District Court seeking a judicial declaration as to the validity of the assessed use taxes, and an injunction restraining respondents California State Board of Equalization and its individual members (hereinafter "Board") from collecting the assessment.

Petitioner filed a motion for preliminary injunction under Rule 65(a)

and (b) of the Federal Rules of Civil Procedure. Respondent filed a motion to dismiss the action pursuant to Rule 12 of the Federal Rules of Civil Procedure.

The District Court granted respondents' motion to dismiss. Petitioner appealed said decision to the Ninth Circuit.

The Ninth Circuit affirmed the judgment of dismissal on the same ground, that the action was barred by § 1341. Consistent with its previous ruling in Wood v. Sargeant, 694 F.2d 1159 (9th Cir. 1982), the Ninth Circuit held that California's prepayment and suit for refund procedure is "plain, speedy and efficient" within the meaning of § 1341, and that a demonstrated inability to prepay a tax in accordance with such procedure does not overcome the jurisdictional bar of § 1341. The Ninth Circuit further held that it was

barred under § 1341 from invoking ancillary jurisdiction based upon United States v. California State Board of Equalization, supra.

REASONS FOR DENYING THE WRIT

1. THE NINTH CIRCUIT DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN ROSEWELL, NOR IS THERE A CONFLICT BETWEEN THE CIRCUITS.

A. There Is No Conflict With This Court's Decision In Rosewell.

One of petitioner's grounds for the issuance of this writ is an alleged conflict between the Ninth Circuit's decision in this case and this Court's decision in Rosewell v. La Salle National Bank, 450 U.S. 803 (1981).

In fact, the Ninth Circuit cited Rosewell both in the instant case and in Wood v. Sargeant, supra, as a precedent it was following in holding that the inability to prepay a tax in accordance with California's refund procedure does not

avoid the jurisdictional bar of § 1341. The Ninth Circuit viewed such decisions to be entirely consistent with and based upon Rosewell, and clearly not in conflict with it. Id., pp. 1160-1161.

Petitioner's argument that the Ninth Circuit's decision herein is in conflict with Rosewell is based entirely on dicta from Rosewell which it has chosen to interpret adversely to respondent. In Rosewell, this Court, in reversing the decision of the Seventh Circuit, held that the action was barred under § 1341 even though the Illinois refund procedure did not provide for the payment of interest on tax refunds. This Court focused on Illinois' refund procedure, and concluded that it met the applicable "procedural criteria" such that it qualified as being "plain, speedy and efficient."

The Illinois and California

refund procedures are virtually identical in that both provide for prepayment of the tax and a full hearing at which taxpayer may raise all constitutional objections to the tax. Id., p. 514; Cal. Rev. and Tax Code § 6933; Capitol Industries - EMI, et al. v. Bennett, 681 F.2d 1107, 1117 (9th Cir. 1982), cert. den. 455 U.S. 943 (1982). The only apparent difference is that in California, interest is paid on tax refunds. Cal. Rev. and Tax Code § 6936. Moreover, there can be no conflict between Rosewell and the instant case because in Rosewell, the taxpayer made no allegation of the inability to prepay as was made in the instant case. Therefore, in Rosewell, this Court could not have and indeed, did not reach the specific issue involving the alleged inability to prepay a tax, that was raised in this petition.

Consistent with the decision in the instant case, this Court in Rosewell approved state procedures requiring pre-payment of the taxes and suits for refund in stating the following:

> "When it passed the Act, Congress knew that state tax systems commonly provided for payment of taxes under protest with subsequent refund as their exclusive remedy. The Senate Report to the Act noted:
>
> 'It is the common practice for statutes of the various States to forbid actions in State courts to enjoin the collection of State and County taxes unless the tax law is invalid or the property is exempt from taxation, and these statutes generally provide that

> taxpayers may contest their taxes only in refund actions after payment under protest. This type of State legislation makes it possible for the States and their various agencies to survive while long-drawn-out tax litigation is in progress.' S.Rep. No. 1035, 75th Cong. 1st Sess., p. 1 (1937). See H.R. Rep. No. 1503, 75th Cong., 1st Sess., p. 2 (1937). See also Matthews v. Rogers, 284 U.S. 521, 526, 76 L.Ed. 447, 52 S.Ct. 217 (1932)." Id., p. 523.

In its complaint, petitioner requested that the District Court enjoin the Board from assessing, levying and collecting sales and use taxes. This is directly contrary to the provisions of 28 U.S.C. § 1341, which prohibits such

relief. § 1341 provides that:

> "The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

It is well established that § 1341 is an explicit Congressional limitation on the jurisdiction of the federal courts in cases which would enjoin, suspend or restrain state tax levy, assessment or collection. California v. Grace Brethren Church 457 U.S. 393, 402-409 (1982); Rosewell v. La Salle National Bank, supra, pp. 526-527.

The California tax refund procedures provide the requisite "plain, speedy and efficient" remedy such as to

invoke the restraints of § 1341. California v. Grace Brotheren Church, supra, p. 417; (Aronoff v. Franchise Tax Board of the State of California 348 F.2d 9, 11 (9th Cir. (1965).)

Prior to its decision in Rosewell, this Court had determined that inconvenience in raising the money with which to prepay taxes does not justify federal injunctive relief. California v. Latimer, 305 U.S. 255, 262 (1938).

In the context of § 1341, the argument that a taxpayer has no "plain, speedy and efficient" remedy where the taxpayer's business would be destroyed if state court refund procedures were required was expressly rejected in Matthews v. Rodgers, 284 U.S. 521, 524, 526 (1932). See also, Aronoff v. Franchise Tax Board of the State of California, 348 F.2d 9 (9th Cir. 1965) (where taxpayer argued unsuccessfully at

state court level prior to the federal decision that there was an exception to the anti-injunction provisions where great financial hardship would result; Aronoff v. Franchise Tax Board, 60 Cal.2d 177, 180 (1963).)

Furthermore, Justice Brennan's statement in Perez v. Ledesma, 401 U.S. 82, 127-128, fn. 17 (1971) (Brennan, J., concurring in part and dissenting in part) is particularly relevant here. Even though petitioner Redding Ford must have made purchases in excess of $6 million for the tax period in question in order for the use tax liability herein to have arisen, petitioner allegedly has inadequate funds to pursue its state remedies. As Justice Brennan indicated: § 1341 does not permit the possible "shift to the State of the risk of taxpayer insolvency." Id., p. 128. (See also, Rosewell v. La Salle National Bank, supra, pp. 450 U.S. 503, 527-528.

("The reasons supporting federal noninterference are just as compelling today as they were in 1937 [year 28 U.S.C. 1341 enacted]")).

B. There Is No Conflict Between The Circuits, Or With Other Decisions By This Court.

Petitioner's contention that the Ninth Circuit's decision herein is in conflict with decisions in other circuits, and with other decisions by this Court are also without merit. In none of the cases cited by petitioner has any court held that the alleged inability to prepay a tax in accordance with a state's suit for refund procedure avoids the jurisdictional bar of § 1341. Apparently the Ninth Circuit is the first circuit to squarely decide this issue, which it has done on two occasions; first in Wood v. Sargeant, 694 F.2d 1159 (1982), and then in the instant case, at 722 F.2d 496 (1983). It is clear that until at least

one other circuit also addresses this issue and decides it contrary to the Ninth Circuit, no conflict between the circuits exists as to this issue, and this petition is at best, premature. Indeed, with the benefit of two Ninth Circuit decisions on this point, the other circuits might well find themselves in agreement with the Ninth Circuit's analysis. At this point, it is speculative to guess how the other circuits might decide this issue when the appropriate facts are put before them. As discussed above, none of the cases cited by petitioner involves the issue of the inability to prepay, and none have held a refund procedure like California's not to be "plain, speedy and efficient" within the meaning of § 1341. In Tully v. Griffin, Inc., 429 U.S. 68 (1976) this Court reversed the District Court's ruling that New York

law did not provide the taxpayer a the taxpayer a "plain, speedy and efficient" remedy because he lacked the means to prepay the assessment or post a bond in accordance with New York's refund procedure. Id., pp. 69-71. This Court instead concluded that New York law did provide the taxpayer a "plain, speedy and efficient" remedy due to the existence of an alternate remedy, and expressly did not reach the question of whether its refund procedure (N.Y. Civ. Proc. Art. 78) would also be "plain, speedy and efficient." Id., p. 76, fn. 8.

In Hillsborough v. Cromwell, 326 U.S. 620 (1946), this Court held that due to the uncertainty surrounding whether the New Jersey state courts could pass on constitutional questions, the bar of § 1341 would be lifted. Id., pp. 625-626. Under New Jersey law, the taxpayer's right of review of

constitutional questions by the New Jersey judiciary was dependent upon the discretionary grant of certiorari to the New Jersey Supreme Court. Ibid. In California, it is clear that all constitutional challenges to the assessment can be addressed. Capitol Industries EMI, Inc. v. Bennett, 681 F.2d 1107, 1117, (9th Cir. 1982), cert. den. 455 U.S. 943 (1982).

As this Court noted in Rosewell in discussing Hillsborough, the key regarding certainty of remedy under Section 1341 is not whether there is a substantive chance for success in state court, but whether there is a "procedural mechanism" for the taxpayer in state court to assert all of its claims, constitutional or otherwise. Rosewell v. La Salle National Bank, supra, pp. 512-517.

In Denton v. City of

Carrolltown, Georgia 235 F.2d 481 (5th Cir. 1956), the Fifth Circuit held that Section 1341 did not bar federal jurisdiction because there was actual doubt concerning the recoverability of the "punitive" license taxes involved therein due to the uncertainty of the Georgia refund procedures. Id., pp. 485-486. Unlike Georgia law, there is no doubt or uncertainty regarding the recoverability of the full amount of taxes paid in a California refund action, if appropriate. The "procedural mechanism" for a full refund exists under California law.

In Ludwin v. City of Cambridge, 592 F.2d 606 (1st Cir. 1979), the First Circuit upheld the District Court's dismissal of plaintiff's request for declaratory relief seeking a declaration that Massachusetts' law requiring payment of real estate taxes prior to judicial review was a denial of procedural due

process. The Court indicated that it believed that plaintiff's state remedy in that case was "adequate" as argued therein. Likewise, petitioner's remedy herein is adequate.

In 28 East Jackson Enterprises, Inc. v. Cullerton 523 F.2d 439 (7th Cir. 1975), cert den. 423 U.S. 1973, reh. den. 424 U.S. 959 (1976), the Seventh Circuit reversed the District Court's order granting plaintiff prelimi nary injunctive relief based on its belief that it was "reasonably certain" that the State of Illinois would entertain a suit for injunctive relief. This dicta does not require this Court to adopt its converse, i.e., that if it were not "reasonably certain" that a state court would entertain a suit for injunctive relief, the District Court properly issued injunctive relief. The court concluded that the taxpayer must

seek equitable relief in the state court, and directed the District Court to dismiss the suit for injunction for lack of jurisdiction.

In Capitol Industries-EMI, Inc. v. Bennett, 681 F.2d 1107 (9th Cir. 1982), two separate actions were brought against the Franchise Tax Board and its members to enjoin a proposed assessment against Capitol. The Ninth Circuit held that as to Capitol, the California refund procedure is "plain, speedy and efficient" and dismissed the complaint under § 1341. As to EMI, since it was not the taxpayer being assessed, the California refund procedure was not applicable to it. The court thus concluded EMI's action was not barred under § 1341. The court explicitly did not reach the question of whether the inability to prepay an assessment may render the California remedy to be of

"doubtful efficiency" as it later did in Wood v. Sargeant, 694 F.2d 1159 (9th Cir. 1982), and in this case. As discussed infra, the Ninth Circuit held in Wood that the inability to pay does not avoid the jurisdictional bar of § 1341.

Two recent decisions, both involving the California requirement that disputed taxes must be paid prior to judicial review, clearly resolve any doubt that the Ninth Circuit's decision in this case was correct.

In California v. Grace Brethren Church 457 U.S. 393 (1982), a number of California churches and religious schools challenged an unemployment compensation tax scheme which did not exempt religious schools unaffiliated with any church. On direct appeal, this Court ruled that § 1341 barred the injunctive relief granted by the

District Court on grounds thatthe taxpayers had a plain, speedy and efficient state court remedy. Moreover, this Court held that since there would be little practical difference between injunctive and declaratory relief in terms of their potential impact on the prompt collection of taxes, both forms of relief must be barred. Id. pp. 407-409. Based on the intent of Congress "to limit drastically" federal court interference with state tax systems, the court construed narrowly the "plain, speedy and efficient" exception to the Tax Injunction Act. (28 U.S.C. section 1341). Id., p. 413.

Wood v. Sargeant, supra, involved the identical issue of the inability to prepay. The court unequivocally rejected the taxpayer's inability to prepay argument and affirmed the District Court's judgment dismissing the action. In crystal clear language the

court held:

> "In none of these cases, however, did we decide whether a plaintiff's inability to pay the tax renders the state remedy, as to that plaintiff, one which is not 'efficient', or one which cannot 'be had in the courts of [the] State' (§ 1341). We now hold that inability to pay the tax does not avoid the jurisdictional bar of § 1341." Id. at p. 1162.

As pointed out by the court in Wood, the potential for abuse of the orderly administration of state tax laws is great. Id., p. 1161. If petitioner's position is adopted, federal actions for injunction containing allegations of the inability to prepay the tax will vastly

increase, resulting in the disruption both of the state's administration of its tax laws and of the federal courts.

Petitioner also argues that an inability of California courts to grant injunctive relief causes its remedies to be inadequate and inefficient within the meaning of § 1341. There is no authority which establishes that a lack of pre-payment injunctive relief renders a state's remedies inadequate or inefficient under section 1341. In fact, such a result would be directly contrary to all of the cases which have found the California tax refund procedure to be "plain, speedy and efficient."

Therefore, the District Court correctly dismissed plaintiff's complaint on grounds that the relief sought was barred by § 1341.

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2. NO OTHER BASIS FOR JURISDICTION EXISTS

Petitioner's argument that the District Court should exercise ancillary or pendent jurisdiction to avoid the bar of § 1341 because allegedly its interests are identical to those of the United States in United States v. California State Board of Equalization, No. 79-03359-R (C.D. Cal. 1979), aff'd in part, vac'd in part, 650 F.2d 1127 (9th Cir. 1981); aff'd 456 U.S. 901 (1982), reh. den. 456 U.S. 985 (1982), is completely unsupported by any authority.

Nothing prevents petitioner from asserting the federal doctrine of collateral estoppel in a state court refund action and thereby raise the effect of the decision reached in United States v. California State Board of Equalization. Indeed petitioner has not argued to the contrary. Therefore,

argued to the contrary. Therefore, petitioner is being deprived of no federal rights by being required to litigate its state tax liability in state court.

Moreover, as acknowledged by petitioner (Petition, p. 18), that case involved only sales tax, not use tax as in this case. Therefore, the two cases involve a different kind of tax, which would make it impossible for petitioner to assert an identity of interests with the United States in that case. Not only are the parties in the two actions different, they do not even involve the same tax.

Petitioner further argues that it is a third party beneficiary of the judgment in question. However, it has cited absolutely no authority supporting this as a basis for invoking ancillary jurisdiction.

For the foregoing reasons, there is absolutely no basis for this Court to invoke ancillary jurisdiction.

CONCLUSION

For all of the foregoing reasons, the Petition For Writ of Certiorari should be denied.

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Respectfully submitted,

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